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SEP 09 2004

**OFFICE OF PETITIONS**

In re Application of	:	
Brian D. Follstad	:	
Application No. 10/620,064	:	DECISION ON PETITION UNDER
Filed: July 15, 2003	:	37 C.F.R. §1.182
Attorney Docket No.: 3374-A	:	
Title: METHOD AND MEDIA FOR	:	
CONTROLLING SIALYLATION OF	:	
PROTEINS PRODUCED BY MAMALIAN	:	
CELLS	:	

BACKGROUND

This is a decision on the petition under 37 CFR §1.182, filed February 17, 2004, to revive the above-identified application.

On October 17, 2003, Petitioner was mailed a Notice of Missing Parts (notice), which set a shortened statutory period for reply of two (2) months. The notice indicated that an executed oath or declaration was required, along with the associated surcharge of \$130.

With the instant petition, Petitioner has submitted the petition fee and surcharge, along with a two-month extension of time. Petitioner has also submitted a docket record, along with an assertion that the notice was not received. In January of 2004, Petitioner submitted a status inquiry, and learned of the notice. At which time, a copy of said notice was sent to him via facsimile transmission. Petitioner requests that the time period for reply be reset, and the extension of time fees be refunded.

THE PORTION OF THE MPEP RELEVANT TO THE INSTANT PETITION

MPEP 711.03(c) states, in part:

In *Delgar v. Schulyer*, 172 USPQ 513 (D.D.C. 1971), the court decided that the Office should mail a new Notice of Allowance in view of the evidence presented in support of

the contention that the applicant's representative did not receive the original Notice of Allowance. Under the reasoning of Delgar, an allegation that an Office action was never received may be considered in a petition to withdraw the holding of abandonment. If adequately supported, the Office may grant the petition to withdraw the holding of abandonment and remail the Office action. That is, the reasoning of Delgar is applicable regardless of whether an application is held abandoned for failure to timely pay the issue fee (35 U.S.C. 151) or for failure to prosecute (35 U.S.C. 133).

To minimize costs and burdens to practitioners and the Office, the Office has modified the showing required to establish nonreceipt of an Office action. The showing required to establish nonreceipt of an Office communication must include a statement from the practitioner stating that the Office communication was not received by the practitioner and attesting to the fact that a search of the file jacket and docket records indicates that the Office communication was not received. A copy of the docket record where the nonreceived Office communication would have been entered had it been received and docketed must be attached to and referenced in practitioner's statement. For example, if a three month period for reply was set in the nonreceived Office action, a copy of the docket report showing all replies docketed for a date three months from the mail date of the nonreceived Office action must be submitted as documentary proof of nonreceipt of the Office action. See Notice entitled "Withdrawing the Holding of Abandonment When Office Actions Are Not Received," 1156 O.G. 53 (November 16, 1993).

The showing outlined above may not be sufficient if there are circumstances that point to a conclusion that the Office action may have been lost after receipt rather than a conclusion that the Office action was lost in the mail (e.g., if the practitioner has a history of not receiving Office actions).

### ANALYSIS

The docket report Petitioner has submitted has been reviewed by the undersigned, and it is noted that the relevant mailing does not appear. Unfortunately, Petitioner has failed to establish nonreceipt of the Office communication, in that he has not submitted an attestation that he has searched the file jacket and the place where he normally would keep such communications and could not find it.

### CONCLUSION

Consequently, the petition is **DISMISSED**.

Should petitioner desire to file a renewed petition, petitioner should first conduct these searches, and include the requisite attestations.

Any response to this decision must be submitted within **TWO (2) MONTHS** from the mail date of this decision. Extension of time under 37 CFR 1.136(a) are permitted. The submission should include a cover letter entitled "Renewed Petition Under 37 CFR §1.182". This is not a final agency action within the meaning of 5 U.S.C 704.

The renewed petition should display "Please deliver to Paul Shanoski, c/o Office of Petitions" in a prominent manner.

To help assure prompt and proper attention to your response, please see Request for Alert Concerning Submitted Petitions, 1282 Official Gazette (May 18, 2004) for further information on how to assist the Office in delivering your submission to the correct location. The Petitioner

may wish to consider telephoning the undersigned one month after the submission is made to confirm that the documents were properly delivered.

Any renewed petition may be submitted by mail<sup>1</sup>, hand-delivery<sup>2</sup>, or facsimile<sup>3</sup>.

**The application file will be retained in the Office of Petitions for two (2) months.**

Telephone inquiries regarding *this decision* should be directed to the undersigned at (703) 305-0011. Please note that on approximately September 28, 2004, the Office of Petitions will relocate to the new PTO location in Alexandria. Although the mailing address will remain the same, the general phone number for the Office of Petitions which should be used for status requests will change to 571-272-3282, and the telephone number for the undersigned will change to 571-272-3225.



**Paul Shanowski**  
**Senior Attorney**  
**Office of Petitions**  
**United States Patent and Trademark Office**

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<sup>1</sup> Mail Stop Petition, Commissioner for Patents, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA, 22313-1450.

<sup>2</sup> Customer Window, Mail Stop Petition, Crystal Plaza Two, Lobby, Room 1B03, Arlington, Virginia 22202.

<sup>3</sup> (703) 872-9306 - please note this is a central facsimile number, and as such, there will be a delay in the delivery of the facsimile to the undersigned, which could be as much as one month.